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# Supreme Court of the United States

October, 1952

No. 196

GEORGE W. FERGUSON AND D. O. SPIRES,
PETITIONERS,

*versus*

THE STATE OF SOUTH CAROLINA, RESPONDENT

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina, filed in the above-entitled case on April 4, 1952, rehearing denied April 17, 1952.

### OPINIONS BELOW

The sentence and judgment of the Trial Court is set out on page 1 of the Transcript of Record. The opinion of the Supreme Court of South Carolina is to be found in 70 S. E. (2d) 355. A certified copy of the decision below has been forwarded with the Transcript of Record.

The indictment, not printed in the Court below, is printed in the appendix to this petition.

## JURISDICTION

The opinion of the Supreme Court of South Carolina was filed April 4, 1952, and a petition for a rehearing was denied on April 17, 1952. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1251 (3).

This Court has jurisdiction on the grounds that Amendments 5, 6 and 14 of the Constitution of the United States have been violated as will more fully appear below. The question of double jeopardy was first raised in the argument concerning the indictment. (See Transcript, pp. 2-9). The question was raised specifically in Exception 36 (Transcript, p. 285) as follows:

> "36. That the sentences in excess of one year as to both defendants were erroneous in that said sentences violated Section 17, Article I of the Constitution of South Carolina, and the Fifth Amendment of the Constitution of the United States, prohibiting the trial of any person twice for the same offense."

The question of double jeopardy pervades much of the record. (See also Exceptions 1, 2, 6, 24 and 25, Transcript, pp. 279-283.) This issue was before the Court below.

The appellants contended throughout the trial that the indictment was defective. (See Transcript, pp. 2-9, Exception 9, p. 280.) This issue was passed on adversely to these appellants by the Court below. See 70 S. E. (2d) p. 357.

Finally the matter of due process is the gravamen of this Court's jurisdiction. The issue, as set out below, is raised innumerable times in the record. (See Transcript, Exceptions 3, 4, 6, 7, 8, 24, 25, pp. 280, 283-284.)

In all instances the Trial Court and the Supreme Court of South Carolina have denied these appellants the immunities to which they are entitled under the Constitution of the United States.

## QUESTIONS PRESENTED

Three federal questions of moment are presented in this petition, *viz.*:

(1) Were these petitioners subjected to double jeopardy by being tried under two indictments for the same crime?

(2) Did the indictments properly inform the petitioners of the charges brought against them by the indictments?

(3) Were the petitioners denied due process of law by being tried for conspiracy to commit a crime which in itself required concerted action?

## STATEMENT

Petitioners were indicted, along with seventeen other defendants, on three counts by the State of South Carolina for: (1) conspiracy to violate the state's lottery statute (Section 1231, Code of Laws, State of South Carolina, 1942), (2) violation of the lottery statute itself by setting up a lottery, and (3) violation of the same statute by the sale and display of lottery tickets. Count 3 was abandoned by the State and the case went to trial on two counts.

State's testimony concerned an alleged meeting which took place on June 4, 1950, in the City of Columbia, South Carolina. Among others alleged to have been at the meeting was the petitioner Ferguson. Some Negro defendants, who had pled guilty prior to the trial, testified that the setting up of the so-called "numbers racket" was discussed

at the meeting. (See Transcript of Record, pp. 10-12.) One of the witnesses (a co-conspirator who had already confessed) testified that Ferguson claimed to "have paid off" the law.

Petitioner Spires was a detective of the Police Department of the City of Columbia. Spires and another detective were in brief attendance at the meeting; they said—and this was not controverted—that they had been called to the house. One of the co-conspirators who had already pled quoted Spires as saying:

> "Whatever they tell you is all right, because I have never turned evidence against anyone, unless I was forced to do it, and I have been on the force twenty-something years." (Transcript of Record, pp. 43-44, 98.)

No other testimony was offered in regard to these petitioners' connection with the alleged conspiracy or with the setting up of the lottery. It is admitted that the "numbers racket" did operate in Columbia during the period specified.

Ferguson did not testify, but Spires freely admitted that he had been called to the house where the alleged conspiracy took plac. He said, however, that he and the other detective had gone in response to a call and that, upon arrival, they found everything in order and shortly thereafter departed. (Transcript of Record, pp. 227-229.) This version was substantiated by the other detective who testified for the State.

The jury found Ferguson guilty on both counts; he was sentenced to serve three years and pay a fine of $1,000.00 on the first count (conspiracy) and he was given a sentence of one year and ordered to pay another $1,000.00 under the second count (setting up lottery). Spires was

found guilty only on the first (conspiracy) count and received a sentence of three years and was ordered to pay a fine of $1,000.00.

The case was appealed to the South Carolina Supreme Court upon exceptions appearing in the Transcript of Record, pages 279-286. The exceptions were all overruled by the South Carolina Supreme Court. This petition is based on those matters relating to rights guaranteed every citizen under the Constitution of the United States.

## SPECIFICATIONS OF ERROR TO BE URGED

The Supreme Court of the State of South Carolina erred:

(1) In failing to hold that these petitioners were subjected to double jeopardy by being tried under two separate indictments, reciting the same facts and relating to a single crime as a matter of law.

(2) In holding that the indictments containing two counts fairly and fully informed these petitioners of the charges so as to allow them to defend themselves properly.

(3) In failing to hold that these petitioners were denied due process by being tried for conspiracy to commit a statutory crime which by definition requires **concerted action.**

## REASONS FOR GRANTING THE WRIT

The petitioners were tried under two indictments; each set out the exact same facts and circumstances. One alleged that the petitioners did "conspire and band themselves together to publicly and privately erect, set up, and expose to be played a certain lottery and undertaking in the nature of a lottery. * * *" The other alleged that the petitioners did "willfully and unlawfully and in furtherance of a common design, pubicly and privately erect, set up and

expose to be played a certain lottery and undertaking in the nature of a lottery * * *"

Conspiracy, a common law crime, is difficult to define, but it was evolved as a criminal legal weapon to be used against those who cannot be reached by the usual methods of the law. The extension of the conspiracy doctrine has, however, resulted in making the criminal court of a playground or judicial abuse.

The dangers of the extension of this doctrine are extensively suggested in the concurring opinion of Mr. Justice Jackson in *Krulewitch v. United States*, 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790.

As Mr. Justice Jackson remarks in regard to the federal law of conspiracy, "Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic'." Further, Mr. Jackson shows that conspiracy originated in the criminal equity administered in the Star Chamber. It allows the introduction of evidence—otherwise inadmissible—upon the assumption from the first of the trial that the conspiracy existed. Further in the *Krulewitch case*, Mr. Jackson said:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of the jurors who are ready to believe that birds of a feather are flocked together * * *"

With these principles in mind, we direct the Court's attention to the conspiracy charges against these petitioners.

The South Carolina statute on lotteries involved reads as follows:

"Section 1231. **Penalty for setting up lotteries.**—Whoever shall publicly or privately erect, set up or expose to be played, drawn or thrown at, any lottery, under the denomination of sales of houses, lands, plate, jewels, goods, wares, merchandise, or other things whatsoever, or for money, or by any undertaking whatsoever, in the nature of a lottery, by way of chances, either by dice, lots, cards, balls, numbers, figures or tickets, or who shall make write, print or publish or cause to be made, written, or published, any scheme or proposal for any of the purposes aforesaid, and shall be convicted of any of the offenses aforesaid, on any indictment for the same, at the court of general sessions, shall forfeit the sum of one thousand dollars, one-third thereof to and for the use of this State, one-third part thereof to the informer, and the other third part thereof to the county where the offense shall be committed; and shall, also, for every such offense, be committed by the said court to the common jail for the space of twelve months."

It is important to note that the statute not only makes the person who erects or sets up the lottery liable but it also covers the person "who shall make * * * or cause to be made * * * any scheme or proposal for any of the purposes aforesaid. * * *"

It is apparent that any act which might be included in a conspiracy indictment is fully and effectively included in the **statute itself**. This principle is applicable to the three specifications of error upon which we petition this Court for a writ of certiorari.

## I

There is no doubt about the rule that the commission of a substantive offense and a conspiracy to commit it are generally separate and distinct. See 15 C. J. S., pp. 1072-1075 (Conspiracy No. 47 (a & b)). A merger will take place only in a limited class of cases.

These exceptions are generically stated by Wharton in 2 Criminal Law No. 1339 as follows:

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained * * *"

An indictment for conspiracy will not lie for the offense of bribery, for example, since the participation of two persons and concert of action were essential to the substantive offense. *United States v. Burke*, 1915, 221 Fed. 1014. Such offenses as bigamy, adultery and fornication will not ordinarily also support an indictment for conspiracy.

The test is whether of not every element essential to proof of the substantive offense is essential to proof of the conspiracy. *Freeman v. United States*, 146 F. (2d) 978. A legislative body has the power to create separate and distinct offenses growing out of the same act, but whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act. *Gavieres v. United States*, 220 U. S. 338, 31 S. Ct. 421, 55 L. Ed. 489.

The effect of these indictments and trials was therefore to subject these defendants to double jeopardy in violation of the Fifth Amendment. The same facts may support two indictments based on crimes distinct in point of law. *Gavieres v. United States, supra.*

But where the **facts** and the **law** are the same in each indictment, the defendants are subjected to double jeopardy. These cases come within the exceptions to the rule against merger by virtue of the wording of the statute itself.

## II

These defendants were indicted on two counts charging the same facts and the same violation—for all of the elements of conspiracy at common law are included in and covered by the South Carolina statute on lotteries.

This, we urge, confounded them in their defense of the cases since they were unable to determine from the language of the indictments themselves what evidence would be brought against them at the trial. Were they "informed of the nature and cause of the accusation?" Sixth Amendment, Constitution of the United States.

Certainly the indictments contained the language of the statute itself, but the first count heaped on top of the statute iself the common law crime of conspiracy. That was covered by the statute. The first count of the indictment should therefore have been quashed in order to guarantee these defendants a fair trial.

## III

Finally we petition for a writ of certiorari on the grounds that these defendants have by this trial been denied the due process guaranteed them by the Fifth and Fourteenth Amendments to the Constitution of the United States.

The sentences meted out present the argument in graphic form. The lottery statute fixed the sentence for the operation or setting up of a lottery or for any acts in contemplation of operating or setting up a lottery at one year; under the conspiracy theory these defendants, for the self-same acts, were given three years each—two years more than specified in the statutory enactment.

This extension of the criminal code by judicial act savors strongly of an *ex post facto* law. At common law, the

setting up of a lottery was not a crime, and lotteries would be allowed in South Carolina without a statutory prohibition. The legislature of a state has the duty to enact the criminal laws; the courts cannot extend the doctrine beyond the statutory enactment.

At common law, no indictments could have been based on a conspiracy to set up a lottery—unless, of course, illegal means were used to do what was otherwise a lawful act. The South Carolina legislature has seen fit to declare the setting up or operation of any lottery a crime, but in that definition the legislature has seen fit to include all the elements of a conspiracy to set up a lottery.

The extension of the doctrine of conspiracy is **at best** a dangerous extension of the criminal law by judicial fiat. Here is an extension in the face of a statutory enactment.

This, we submit, was a denial of due process of law for the petitioners.

## CONCLUSION

We make this petition to this Court with great hope. While this appeal may not be allowed on technical grounds, we think it time for this Court to halt this pernicious conspiracy doctrine. It is perverting courts of justice into wicked tools for the infliction of wrong.

Where will it end? Assuredly, a conspiracy to violate the parking ordinance or a common design to jay walk do not subject the "law breakers" to penitentiary sentences. What reason is there here to indict for conspiracy? None—for the statutory enactment on lotteries covers the field.

The criminal cannot be allowed to measure his punishment on a contractural basis—*i. e.*, on the proposition that for a given crime, he can be assured of a definite maximum sentence—and no more. But our guarantee of liberty for

every citizen—regardless of station or estate—can be thwarted and twisted by the Star Chamber doctrine of conspiracy.

It is to this Court's conscientious and consistent regard for our most precious possession—individual liberty—that we address this petition. Conspiracy! It is an awesome charge; it is easy to bandy about; it provides an ample net for catching the sneak; but its seine may gather in the innocent as well.

Conspiracy is a weapon to be used against criminals not otherwise subject to punishment. But the doctrine must have limits; such a limit has been delineated in the South Carolina Statute.

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Attorneys for the Petitioners.

# APPENDIX

## Indictment—Two Counts

At a Court of General Sessions, begun and holden in and for the County of **RICHLAND** in the State of South Carolina, at **RICHLAND COUNTY** Court House, in the County and State aforesaid, on the **Second** Monday of **December**, in the year of our Lord, one thousand nine hundred and **fifty**.

The Jurors of and for the County aforesaid, in the State aforesaid, upon their oath, Present:

That **GEORGE W. FERGUSON, CARL JOLLY, D. O. SPIRES, W. W. WALKER, DAVID DUVALT, TOLBERT MILES, EDDIE WEBBER, MELL JOHNSON, JOSH GILMORE, WILLIE BLAKE, PEARL JONES, LUCINDER SMITH, ADA TAYLOR, ROBERT LYKES, SARAH DAVIS, LOUIS WALLACE, WILLIE SUBER, AURELIA MICKENS, AND JOHN GLASPER,**

### First Count

late of the County and State aforesaid, on the **4th day of June** in the year of our Lord one thousand nine hundred and **fifty** with force and arms, at **Richland County Court House** in the County and State aforesaid, **did wilfully and unlawfully agree, confederate, conspire and band themselves together to publicly and privately erect, set up, and expose to be played a certain lottery and undertaking in the nature of a lottery, wherein and whereby the use of certain numbers, figures, tickets or chances were TO BE HAD AND OFFERED TO CERTAIN PERSONS UNKNOWN, WHEREIN AND WHEREBY for the payment of certain sums of money, differing in amounts, the holders of the said numbers, figures, tickets or chances were to participate in a lottery and undertaking in the nature of a lottery, commonly known as the "numbers game," whereby said sums of money to be paid were to be ventured for the chances of obtaining larger sums in money; and that in pursuance of said agreement and conspiracy, and in furtherance of the said common design, they the said GEORGE W. FERGUSON, CARL JOLLY, D. O. SPIRES, W. W. WALKER, DAVID DUVALT, TOLBERT MILES, EDDIE**

**WEBBER, MELL JOHNSON, JOSH GILMORE, WILLIE BLAKE, PEARL JONES, LUCINDER SMITH, ADA TAYLOR, ROBERT LYKES, SARAH DAVIS, LOUIS WALLACE, WILLIE SUBER, AURELIA MICKENS, AND JOHN GLASPER, late of the County and State aforesaid,** did on the 4th day of June, in the year of our Lord, one thousand nine hundred and fifty, with force and arms at Richland County Court House, wilfully, unlawfully, publicly and privately erect, set up and expose to be played a certain lottery and undertaking in the nature of a lottery, wherein and whereby the use of certain numbers, figures, tickets or chances were had and offered to certain persons unknown, wherein and whereby for the payment of certain sums of money, differing in amounts the holders of the said numbers, figures, tickets or other chances were entitled to participate in a lottery and undertaking in the nature of a lottery, commonly known as the "numbers game," whereby said sums of money paid were ventured for the chances of obtaining larger sums in money, against the form of the Statute made in such case and provided against the peace and dignity of the State.

AND THE JURORS AFORESAID, UPON THEIR OATH AFORESAID, DO FURTHER PRESENT: That GEORGE W. FERGUSON, CARL JOLLY, D. O. SPIRES, W. W. WALKER, DAVID DUVALT, TOLBERT MILES, EDDIE WEBBER, MELL JOHNSON, WILLIE BLAKE, PEARL JONES, LUCINDER SMITH, ADA TAYLOR, ROBERT LYKES, SARAH DAVIS, LOUIS WALLACE, WILLIE SUBER, AURELIA MICKENS, late of the County and State aforesaid, did on the 4th day of June, in the year of our Lord One Thousand Nine Hundred and Fifty, with force and arms at Richland County Court House in the State aforesaid, wilfully and unlawfully and in furtherance of a common design, publicly and privately

Second Count

erect, set up, and expose to be played a certain lottery and undertaking in the nature of a lottery, wherein and whereby the use of certain numbers, figures, tickets, or chances

were had and offered to certain persons unknown, wherein and whereby for the payment of certain sums of money, differing in amounts, the holders of the said numbers, figures, tickets or chances were entitled to participate in a lottery and undertaking in the nature of a lottery, commonly known as the "numbers game," whereby said sums of money paid were ventured for the chances of obtaining larger sums in money, against the form of the Statute in such case made and provided against the peace and dignity of the State.

And the Jurors aforesaid, upon their oath aforesaid, do further Present, That **GEORGE W. FERGUSON, CARL JOLLY, D. O. SPIRES, W. W. WALKER, DAVID DUVALT, TOLBERT MILES, EDDIE WEBBER, MELL JOHNSON, JOSH GILMORE, WILLIE BLAKE, PEARL JONES, LUCINDER SMITH, ADA TAYLOR, ROBERT LYKES, SARAH DAVIS, LOUIS WALLACE, WILLIE SUBER, AURELIA MICKENS AND JOHN GLASPER,** late of the County and State aforesaid, on the **4th** day of **June** in the year of our Lord one thousand nine hundred and **fifty,** with force and arms, at **Richland County Court House** in the County and State aforesaid, did **wilfully and unlawfully offer for sale and did sell to certain persons unknown certain lottery tickets, figures, and chances, wherein and whereby for the payment of certain sums of money, differing in amounts the holders of the said numbers, figures, tickets and chances were entitled to participate in a lottery and undertaking in the nature of a lottery, commonly known as the "numbers game," whereby said sums of money paid were ventured for the chances of obtaining larger sums in money,** in such cases made and provided and against the peace and dignity of the State.

(s) T. P. TAYLOR,
Solicitor.